FILED
SEP 29 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-272

In the Supreme Court of the United States

JOHN GARAMENDI, IN HIS CAPACITY AS THE COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Petitioner,

v.

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, US BRANCH, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the National League of Cities, International Municipal Lawyers Association, New Jersey State League of Municipalities, League of California Cities, and California State Association of Counties, as *Amici Curiae* in Support of Petitioner

JOHN M. BAKER
Counsel of Record
PAMELA L. VANDERWIEL
GREENE ESPEL, P.L.L.P.
200 S. SIXTH STREET, SUITE 1200
MINNEAPOLIS, MN 55402
(612) 373-0830

Attorneys for Amici Curiae

Becker Gallagher Legal Publishing, Inc., 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF LEGAL ARGUMENT 2

LEGAL ARGUMENT 2

I. BY AWARDING FEES UNDER § 1988 TO PLAINTIFFS WITH UNSUCCESSFUL § 1983 CLAIMS, THE NINTH CIRCUIT CREATED A CONFLICT WITH AT LEAST TWO OF THIS COURT'S DECISIONS 2

A. The Ninth Circuit's Decision Conflicts with its Principal Authority, a Footnote in this Court's 1980 Decision in *Maher v. Gagne* 2

B. The Ninth Circuit's Decision Conflicts with this Court's 1995 Decision in *National Private Truck Council* 5

II. THE NINTH CIRCUIT'S DECISION CREATED A CONFLICT WITH OTHER STATE AND FEDERAL APPEALS COURTS 6

III. IF NOT OVERTURNED, THE NINTH CIRCUIT'S DECISION WILL ENCOURAGE THE INCLUSION OF INVALID § 1983 CLAIMS IN CASES PROPERLY RESOLVED UNDER OTHER LAWS 7

A. If Left Undisturbed, the Ninth Circuit's Decision will Cause Plaintiffs with Good State-Law Claims to Plead Poor Constitutional Claims, Burdening both the Courts and Local Governments 7

B. The Ninth Circuit Refused to Limit its Precedent to Cases Where this Court Grants, but Declines to Exercise, Review of Fee-Generating Claims . . . 10

IV. THE NINTH CIRCUIT'S DECISION UPSETS THE BALANCE OF FEDERAL AND STATE AUTHORITY 12

CONCLUSION 14

TABLE OF AUTHORITIES

Federal Cases

Bailey v. Wood, 909 F.2d 1197 (8th Cir. 1990) 8

Bonner v. Guccione, 178 F.3d 581 (2d Cir. 1999) 7

Braxton v. United States, 500 U.S. 344 (1991) 6

Cent. Pines Land Co. v. United States,
274 F.3d 881 (5th Cir. 2001) 11

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 8

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 13

Frank v. United Airlines, Inc.,
216 F.3d 845 (9th Cir. 2000) 11

Hagans v. Lavine, 415 U.S. 528 (1974) 3, 6

Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980) 7

Healy v. Ratta, 292 U.S. 263 (1934) 13

Hensley v. Eckerhart, 461 U.S. 424 (1983) 5

Luria Bros. & Co. v. Allen,
672 F.2d 347 (3d Cir. 1982) 7

Maher v. Gagne, 448 U.S. 122 (1980) 2, 3, 4

McDonald v. Doe,
748 F.2d 1055 (5th Cir. 1984) 5, 7, 9

Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n,
515 U.S. 582 (1995) 5, 6, 7

Raley v. Fraser, 747 F.2d 287 (5th Cir. 1984) 7

Reel v. Ark. Dep't of Corr.,
672 F.2d 693 (8th Cir. 1982) 7

River Park, Inc. v. City of Highland Park,
23 F.3d 164 (7th Cir. 1994) 8

Ross v. Moffitt, 417 U.S. 600 (1974) 10

Smith v. Robinson, 468 U.S. 992 (1984) 5

Syngenta Crop Prot., Inc. v. Henson,
537 U.S. 28 (2002) 13

Triple G Landfills, Inc. v. Board of Comm'rs of Fountain County, Ind.,
977 F.2d 287 (7th Cir. 1992) 9

United Mine Workers of Am. v. Gibbs,
383 U.S. 715 (1966) 13, 14

State Cases

Agric. Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.,
739 P.2d 140 (Cal. 1987) 11

Commonwealth v. Lotz Realty Co.,
376 S.E.2d 54 (Va. 1989) 7

Gumbhir v. Kan. State Bd. of Pharmacy,
646 P.2d 1078 (Kan. 1982) 7

Jackson v. Inhabitants of the Town of Searsport,
456 A.2d 852 (Me.), *cert. denied*,
464 U.S. 825 (1983) 7, 13

Or. State Police Officers Ass'n, Inc. v. State,
783 P.2d 7 (Or. 1989), *cert. denied*,
498 U.S. 810 (1990) 7

Federal Statutes

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 1988 . . . . . *passim*

Federal Rules

Sup. Ct. R. 16 10

Other Authorities

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., reprinted in Staff of Senate Comm. on the Judiciary, 94th Cong., 2d Sess., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SOURCE BOOK 212 (Comm. Print 1976) 2, 3, 4

Comment, *Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*,
130 U. PA. L. REV. 488 (1981) 5, 6

STATEMENT OF INTEREST

This case is vitally important to amici, whose members include state and local governments throughout the United States.[1] The National League of Cities is the oldest and largest national organization representing municipal governments throughout the United States. It is a resource and advocate for over 18,000 cities, towns and villages. The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization whose 1,400 members include local governments of all kinds, state municipal leagues, and attorneys who represent local governments. The New Jersey State League of Municipalities is a voluntary organization including in its membership all 566 New Jersey municipalities. The League of California Cities is an association of 476 California cities united in promoting the general welfare of cities and their residents. The California State Association of Counties advocates the interests of the 58 California counties.

The special interest of these amici in this case lies in the impact the Ninth Circuit's decision will have on local governments, if not overturned. As explained in greater detail below, local governments, already facing high litigation costs, will now be faced with increased federal litigation as more plaintiffs assert invalid § 1983 claims to lay the groundwork for an award of § 1988 fees.

---

[1] This brief was not authored in whole or in part by any counsel for a party, and no person or entity other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

SUMMARY OF LEGAL ARGUMENT

The U.S. Court of Appeals for the Ninth Circuit ruled that an award of attorney's fees is appropriate under 42 U.S.C. § 1988 ("§ 1988") even where the plaintiff lost on all its "fee generating" 42 U.S.C. § 1983 ("§ 1983") claims in the last court to consider those claims on the merits. This ruling conflicts with at least two of this Court's precedents, and creates a conflict with the law as enunciated by many other federal and state appellate courts. It will encourage plaintiffs to bring invalid constitutional claims in run-of-the-mill state lawsuits in the hope that, even if the constitutional claims are rejected in the lower court, they will be awarded attorney's fees under § 1988. Reversal of the decision is necessary to resolve the conflict in the law and to prevent the consequences that will follow if the decision is left undisturbed.

LEGAL ARGUMENT

I. BY AWARDING FEES UNDER § 1988 TO PLAINTIFFS WITH UNSUCCESSFUL § 1983 CLAIMS, THE NINTH CIRCUIT CREATED A CONFLICT WITH AT LEAST TWO OF THIS COURT'S DECISIONS.

A. The Ninth Circuit's Decision Conflicts with its Principal Authority, a Footnote in this Court's 1980 Decision in *Maher v. Gagne*.

The court below based its fees decision on a footnote of dicta in *Maher v. Gagne*, 448 U.S. 122, 132-33 (1980) (which in turn was derived from a footnote in the Committee Report accompanying H.R. 15460, the House counterpart to what became § 1988).[2] Under the *Maher* footnote, a plaintiff

---

[2] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976) ("House Committee Report"), reprinted in Staff of Senate Comm.

is entitled to attorney's fees in one of two circumstances: (1) there was a determination of his fee generating claims, and that determination was favorable; or (2) there was no determination of his fee generating claims because of judicial reluctance to reach constitutional claims unnecessarily, but the plaintiff was successful in his non-fee generating claims and it is determined that the fee generating claims were "substantial" under the jurisdictional test in *Hagans v. Lavine*, 415 U.S. 528 (1974). *Maher*, 448 U.S. at 132 n.15; House Committee Report, *supra* note 2, at 4 n.7.[3] Neither of these conditions was present in this case, yet the Ninth Circuit found that the *Maher* footnote entitled Plaintiffs to recover

---

on the Judiciary, 94th Cong., 2d Sess., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SOURCE BOOK 212 (Comm. Print 1976). The *Maher* footnote constitutes dicta because both the Court's opinion and Justice Powell's concurrence stated that "there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim." *Maher*, 448 U.S. at 130; *id.* at 135 (Powell, J., concurring in relevant part) (noting "that the Court has reserved the question 'whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim.'").

[3] A federal claim is "substantial" for these purposes unless it is so frivolous that a federal court would lack jurisdiction to hear it. *See Maher*, 448 U.S. at 132 n.15 (citing the "substantiality" test in *Hagans*); *Hagans*, 415 U.S. at 542-43 (a federal claim is "substantial" unless "the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction," or it is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.").

their fees under § 1988. (Petitioners' Appendix ("App.")) 11-13.

The Ninth Circuit's decision conflicts with *Maher*. *Maher* and the House Committee Report state that, "[t]o the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." *See Maher*, 448 U.S. at 132 n.15 (quoting House Committee Report, *supra* note 2, at 4 n.7). If a plaintiff prevailing on a non-fee-generating claim is "entitled to a determination on the other [fee-generating] claim for the purpose of awarding counsel fees," *id.*, it follows that such a determination, when made, should matter. To the Ninth Circuit, it did not. There was indeed a determination of the plaintiffs' fee generating claims, but that determination (made by the Ninth Circuit) was *unfavorable*. And although this Court granted certiorari, this Court ruled only on the non-fee-generating claim, leaving undisturbed the Court of Appeals' ruling that the fee-generating claims lacked merit. An award of attorney's fees under these circumstances constitutes a dramatic expansion of parties' entitlement to fee awards under § 1988.

Even if additional latitude may be available where a court was "reluctant to resolve" the fee-generating claim, *id.*, a court that was *not* reluctant to resolve a constitutional claim, but rejected that claim on the merits, can find no basis in § 1988, *Maher*, or the House Committee Report to award fees. In the words of the late Judge Alvin B. Rubin of the Fifth Circuit:

> [§ 1988] was adopted because the actions in which fees are allowed vindicate rights based on the federal constitution or federal statutes. If it is determined that

> no constitutional right was violated, the predicate for the award of fees vanishes.

McDonald v. Doe, 748 F.2d 1055, 1057 (5th Cir. 1984); *see also* Comment, *Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*, 130 U. Pa. L. Rev. 488, 519 (1981) ("Pennsylvania Comment") (it would be a "distortion of the Act's purpose" if a plaintiff is permitted to receive fees in spite of the possible lack of merit of the underlying civil rights claim).

B. The Ninth Circuit's Decision Conflicts with this Court's 1995 Decision in *National Private Truck Council*.

The Ninth Circuit's decision also conflicts with this Court's more recent pronouncement in *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 592 (1995), that "when no relief can be awarded pursuant to Section 1983, no attorney's fees can be awarded under Section 1988."[4] The Ninth Circuit's initial opinion made no reference to *National Private Truck Council*. However, on rehearing, the panel left in place its holding and its opinion, but added a footnote acknowledging this Court's ruling in *National Private Truck Council*. App. 3. The Ninth Circuit merely stated that "[i]f a plaintiff does not have a substantial, properly cognizable § 1983 claim, then § 1988 attorney's fees may not be awarded. In addition, if the Supreme Court in

---

[4] *Accord Smith v. Robinson*, 468 U.S. 992, 1009 n.12 (1984) ("There is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's fees. *But where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, Hensley v. Eckerhart*, [461 U.S. 424 (1983)] requires that fees not be awarded on the basis of those claims.") (emphasis added).

this case had expressly affirmed *Gerling II's* rejection of plaintiff's due process and Commerce Clause claims, then plaintiff would not be entitled to § 1988 fees." App. 3.

The Ninth Circuit's reasons for disregarding *National Private Truck Council* have little to do with what this Court actually stated in that case. The fact that a § 1983 claim is not so frivolous that it fails the "substantiality" test does not mean that "relief can be awarded pursuant to Section 1983." *Contrast Nat'l Private Truck Council,* 515 U.S. at 592.[5] Indeed, because summary judgment was granted against plaintiffs' § 1983 claim, "relief" could *never* "be awarded pursuant to Section 1983." Moreover, the Ninth Circuit's reasoning ignores the basic fact, noted by Judge Graber in her concurrence and uncontradicted in the panel's opinion, that *Gerling II's* rejection of plaintiffs' fee-generating claims has binding, precedential effect. App. 19, n.1.

II. THE NINTH CIRCUIT'S DECISION CREATED A CONFLICT WITH OTHER STATE AND FEDERAL APPEALS COURTS.

Not only does the decision below conflict with this Court's prior decisions, it also creates a conflict with other state and federal appeals courts. As this Court has recognized, the "principal purpose for which [this Court uses its] certiorari jurisdiction . . . is to resolve conflicts among United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States,* 500 U.S. 344, 347 (1991). The clear majority of federal appeals courts have held that § 1988 precludes awards of attorneys

---

[5] "It will be a rare case when plaintiffs cannot construct a 'substantial' procedural due process claim within the *Hagans* Court's definition of that word." Pennsylvania Comment, *supra* page 5, at 508.